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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1825

CITY OF WILLCOX AND
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The City of Willcox and the Arizona Electric Power Cooperative, Inc. (AEPCO) pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in this proceeding on January 21, 1974.

AEPCO conditionally requests review of the issues framed by this Petition if, but only if, the Court grants any of the other petitions for certiorari directed against the decision below.

The challenged orders of the Federal Power Commission (FPC) which are the subject of this and other pending[1] petitions for certiorari review prescribe an "interim" curtailment plan to deal with an emergency situation of limited duration and were to expire, by their terms, on October 31, 1973, or earlier if the agency then prescribed a permanent curtailment plan. But on October 18, 1973, the FPC extended the operation of the interim plan for an indefinite future period pending its further action on a permanent plan. No such plan has yet been prescribed. The decision below dealt only with the interim plan.

AEPCO believes that review by this Court of the lower court's decision respecting the interim plan may not be necessary in view of the possibility that the FPC may soon issue a permanent curtailment plan. Such action would moot all pending petitions for certiorari unless the decision below is deemed applicable to the permanent plan. But, AEPCO believes that the decision of the Court below with respect to the issues framed by this petition and the other petitions for certiorari was, and should have been, made only in the context of an evidentiary record, briefs and arguments concerning the lawfulness of an interim plan and, therefore, should not be a precedent with respect to a permanent plan. For these reasons, AEPCO respectfully requests this Court to affirm *per curiam*, without oral argument, the opinion of the Court below, expressly limiting such affirmance to the decision on the interim plan in order to preserve the right of all petitioners to judicial review with respect to the same issues in the more important and far-reaching context of the permanent curtailment plan. On the other hand, if this Court grants the

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[1] Pacific Gas and Electric Company, No. 73-1776; San Diego Gas and Electric Company, No. 73-1790; and Southern California Gas Company, No. 73-1772.

petitions for certiorari, which have been filed by parties whose interests and positions are inconsistent with AEPCO's, we seek review of the issues framed by our petition in order to protect our right of judicial review with respect to both the interim and permanent curtailment plans.

OPINIONS BELOW

The opinion of the Court of Appeals, decided *sub nom. American Smelting and Refining Co., et al. v. FPC*, not yet reported, appears as Appendix A to the Petition of Pacific Gas and Electric Company (PG&E), No. 73-1776.[2] The principal order of the Federal Power Commission (FPC), Opinion No. 634 issued October 31, 1972 (Appendix C), and its order denying rehearing, Opinion No. 634-A issued December 15, 1972 (Appendix D), are reported at 48 F.P.C. 931 and 48 F.P.C. 1369, respectively.

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was entered on January 21, 1974. Timely petitions for rehearing were denied by order dated February 25, 1974 (Appendix B). This petition for certiorari is filed within 90 days of March 5, 1974, the date upon which the Court below issued its mandate. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. §717r(b) (Appendix G).

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[2]References to Appendices are to those set forth in the Petition of Pacific Gas and Electric Company, upon which AEPCO relies pursuant to the consent of that party. However, Appendix H is reprinted in full.

STATUTES INVOLVED

The statutory provisions germane to the decision of this case are §§ 4, 5 and 19 of the Natural Gas Act, 15 U.S.C. §§717(c), 717(d) and 717(r) and §557 of the Administrative Procedure Act, 5 U.S.C. 557. These statutory provisions are set forth in full as Appendices E, F, G, and H, respectively.

QUESTION PRESENTED

In overriding contractual rights to gas deliveries during periods of shortage by "finding" such contracts unlawfully discriminatory, did the FPC violate §5(a) of the Natural Gas Act, requiring findings based on record evidence as a prerequisite to such action, §557(c) of the Administrative Procedure Act requiring the agency to rule on every material issue presented for decision and did the FPC deny due process of law under the Fifth Amendment, when it merely accepted the pipeline's self-serving interpretation of such contracts as exempting all California customers from curtailment until all east-of-California customers were completely curtailed without making any analysis, findings or conclusions on the issues raised by petitioners of whether such contracts provided for equal curtailment in all geographic areas served?

STATEMENT OF THE CASE

AEPCO is a rural, nonprofit electric cooperative association financed by the Rural Electrification Administration which generates and transmits electrical power sold, entirely on a firm basis, to four other REA cooperatives. It serves a widespread geographic area with an abnormally low population density and its customers are totally dependent upon it for essential electrical service.

AEPCO built and financed its plant in reliance upon its contract right to firm deliveries from Willcox of stated daily maximum quantities of gas and Willcox, in turn, has such rights under a service agreement with El Paso. These are long term contracts commencing March 31, 1970 and ending December 31, 1983. These contractual service arrangements were approved by the FPC.

This petition is directed against the FPC's action, in the challenged agency orders, in relegating all gas consumed by AEPCO to the lowest service priority during periods of curtailment by overriding its contractual and tariff rights as a firm resale customer to a priority over industrial gas consumed by interruptible resale customers and by El Paso's own direct customers. This inversion of curtailment priorities is extremely costly to AEPCO and to the ultimate consumers of the electricity it generates and transmits.[3] The Natural Gas Act does not provide any remedy in curtailment situations and rate refunds provided by that statute are neither available nor appropriate remedies. Furthermore, the FPC's action in prescribing its own curtailment plan may completely shield El Paso from damage liability.

AEPCO filed a petition with the U.S. Court of Appeals for the District of Columbia Circuit for review of the FPC's

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[3]On a comparable thermal energy basis, measured by per million BTU, AEPCO's cost for natural gas is 39.83¢ and its cost for fuel oil is $1.14. Thus, AEPCO incurs an additional cost of 74.17¢ per Mcf of curtailed gas volumes. The data upon which these calculations are based is drawn from the evidentiary record in the extraordinary relief phase of this docket which the FPC has not certified as part of the record here. However, such evidence only became available after the close of the evidentiary record in the interim proceeding and, to the best of our knowledge, is not disputed by any party. In the 10 months from January through October, 1974, alone, AEPCO will be compelled to pay an additional $1,351,272.

action[4] under §19 of the Natural Gas Act (Act), 15 U.S.C. §717r[5], and prevailed with respect to several issues[6] although not with respect to the issue framed by this petition.

With respect to the latter issue, the FPC abrogated and nullified all existing contractual delivery rights during periods of gas shortages as between *industrial* customers on the ground that El Paso's preexisting contracts and tariff curtailment provisions "As interpreted by El Paso" provided that ". . . no curtailment would take place to California customers until all EOC service had been curtailed."[7] It was solely upon this basis that the FPC concluded that *human needs* customers east-of-California would be completely cut off before industrial customers in California were curtailed and that the contracts were patently discriminatory and violative of §4(b) of the Natural Gas Act. But the FPC unlawfully delegated to El Paso its function of interpreting that pipeline's filed contracts and tariffs and made no analysis, findings or conclusions on the crucial threshold issue of whether this was a correct interpretation of the contract provisions respecting cur-

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[4]Opinion Nos. 634 and 634-A (Appendices C and D).

[5]AEPCO's Petition was consolidated with eight others directed against different aspects of challenged agency orders.

[6]The Court of Appeals reversed the FPC and remanded its orders with respect thereto. Such actions are not encompassed within the scope of the issues framed by this Petition.

[7]Appendix C, p. 62. EOC refers to east-of-California. It is undisputed that curtailment of the California industrial load would provide enough additional gas to serve all human needs throughout the pipeline's system and eliminate any possibility of discrimination against human needs customers.

tailments. AEPCO[8] and other parties[9] argued to the FPC that both the preexisting contracts and tariffs provided for equal and simultaneous curtailment of California and east-of-California industrial loads.

AEPCO and other parties also argued this view at length at the lower court[10] which took cognizance of this dispute[11] but sustained the FPC's findings entirely in reliance upon the fact that the agency:

> ". . . found that, in the event of a gas shortage, El Paso's existing tariff provisions called for complete cut-off of all EOC customers, including residential and small commercial customers, before any service to California would be curtailed." [Slip op. 13, footnote omitted.]

However, it did not rule upon or even discuss AEPCO's arguments on the issue. Furthermore, the lower Court's opinion bases its affirmance of the FPC's finding of discrimination entirely upon its interpretation of such contracts and tariffs. Thus, the Court stated:[12]

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[8]Initial Brief, October 3, 1972, pp. 7-8; and Petition for Rehearing, Modification of Opinion No. 634, Motion for Stay, and Amended Motion for Extraordinary Relief, November 30, 1972, pp. 2-10.

[9]American Smelting and Refining Co., et al., Initial Brief, October 3, 1972, pp. 7-10; Nevada Power Company, Initial Brief, October 3, 1972, pp. 6-9; Tucson Gas and Electric Company, Initial Brief, October 3, 1972, pp. 19-20 and addendum B, pp. 1-5.

[10]AEPCO Brief in Support of Motion for Summary Reversal, pp. 17-23; and Initial Brief of American Smelting and Refining Co., et al. at 2-9.

[11]Appendix A, note 12 at page 17.

[12]Appendix A, p. 11.

"In Opinion No. 634 the Commission found that, under tariff provisions then in effect, El Paso's California customers would be protected from service curtailments until all service to EOC customers had been completely cut off. *As a result, the Commission found, human needs customers (residential and small commercial customers) in one part of the El Paso system would be subordinate to industrial customers in another part in the event of a severe gas shortage.* (Emphasis added.)

REASONS FOR GRANTING THE WRIT

This petition raises issues of first impression and nationwide scope which are of exceptional importance to the solution of the problems posed by the current shortage of natural gas in the United States. The decision of the Court of Appeals correctly recognizes that the FPC may not override an existing contract curtailment plan to substitute its own subjective notions of what constitutes an ideal curtailment plan for the arrangement voluntarily negotiated by the parties, but is required by the governing provisions of its enabling act to make express and precise findings, based on substantial evidence in the record, that such contractual provisions are contrary to the public interest because unlawfully discriminatory or preferential.[13] But, in reaching its decision, the lower Court afforded such a finding by the FPC an unlawful and unwarranted presumption of validity despite the absence of any supporting evidence, substantial or otherwise, and the agency's failure

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[13] Appendix A, p. 32, p. 17, p. 19.

to articulate any supporting reasons. If this decision is permitted to stand, and especially if it is a precedent with respect to permanent as well as interim curtailment plans, the FPC will enjoy the option of abrogating and nullifying the curtailment provisions of every contract between interstate pipelines and their customers by simply making a bare and unsupported recital of unlawfulness which, moreover, will not be subject to effective judicial review. Such a policy of limiting the scope of judicial review of curtailment plans eviscerates the lower Court's own proper conclusion that Congress did not vest the FPC with unlimited and plenary authority to substitute its own preferred curtailment plans for fair and lawful curtailment plans embodied in the contractual arrangements between pipelines and their customers and in the tariffs of such natural gas companies. The FPC has made no other findings of fact that the substitution of the challenged agency-prescribed service priorities for those embodied in the existing contracts and tariffs will better serve the public interest or indeed that they will serve the public interest as well. Petitioners therefore respectfully submit that the issue raised by this petition for certiorari review is, for these reasons, one of exceptional importance to the administration of the Act.

In any event, the FPC also violated §557(c) of the Administrative Procedure Act by failing to rule upon AEPCO's argument that if its interpretation of the contract and tariffs is correct, the simplest and least disruptive solution to the discriminatory exemption of California from curtailment was to revise the tariffs to eliminate this single unlawful feature and direct El Paso to curtail California and east-of-California customers on a basis of equality. Had this been done, curtailment of the California industrial load would have made enough peak day gas

available[14] to assure full satisfaction of all human needs residential and commercial gas requirements throughout El Paso's system. Instead, the FPC has resorted to a bootstrapping process of refusing to decide the primary and overriding issue of the curtailability of California industrial loads under the contracts and thereby unlawfully usurp jurisdiction and supersede completely such preexisting curtailment provisions in order to eliminate a non-existent discrimination. AEPCO respectfully submits that such deliberate and willful refusal to reach a decision on the merits or make any findings of fact or conclusions of law is arbitrary, capricious, unreasonable and a deprivation of due process under the Fifth Amendment to the United States Constitution. Petitioners further submit that the FPC has in these respects also violated the requirements of §557(c) of the Administrative Procedure Act that agency decisions shall rule on every material issue of fact, law or discretion presented on the record and shall state supporting reasons.

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[14]Exhibit 237, Schedule 1, pp. 13-14.

CONCLUSION

AEPCO's petition for writ of certiorari should be granted if the Court grants other pending petitions for review. In the alternative, this Court should affirm *per curiam* without oral argument and limit such affirmance to the decision with respect to the interim plan.

Respectfully submitted,

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Attorneys for Petitioners

City of Willcox and
Arizona Electric Power
Cooperative, Inc.

June, 1974

Appendix H

Administrative Procedure Act §8 (5 U.S.C. §557)

Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining application for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.